Supreme Court, U. S.
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No. 75-1146

In the Supreme Court of the United States

OCTOBER TERM, 1975

PAUL BRADLEY, WILLIAM COUSINS, PATRICK J. HUGHES, RONALD C. SMITH, CHARLOTTE ADELMAN, SHELVIN SINGER,

Plaintiffs-Appellants,

vs.

FRANKLIN J. LUNDING, JR., Chairman, State Board of Elections Commissioners, WILLIAM L. HARRIS, Vice Chairman, DON W. ADAMS, MICHAEL E. LAVELLE and JAYNE PRICE, Chief Clerk,

Defendants-Appellees,

JOHN A. MC ELLIGOTT, AUBREY F. KAPLAN, ARTHUR J. CIESLIK, JEROME LARNER, FRANCIS J. MAHON, HOWARD M. MILLER, MARILYN ROZMAREK KOMOSA, ADAM N. STILLO, R. EUGENE PINCHAM, MARY ANN GROHWIN MC MORROW, RICHARD L. SAMUELS, GERALD L. SBARBORO, THEODORE M. SWAIN, ANTHONY J. SCOTILLO, JAMES A. ZAFIRATOS, JOHN H. MC COLLOM, SYLVESTER C. CLOSE, WILLIAM E. PETERSON, JOHN F. REYNOLDS, RAYMOND S. SARNOW, RAYMOND C. SODINI, JAMES TRAINA, JOSE R. VAZQUEZ, RUDOLPH L. JANEGA and WARREN D. WOLFSON,

Intervening Defendants-Appellees.

Appeal from the Supreme Court of Illinois

JURISDICTIONAL STATEMENT

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Intervening Defendants-Appellees.

Appeal from the Supreme Court of Illinois

JURISDICTIONAL STATEMENT

Appellants appeal from a judgment of the Supreme Court of Illinois entered on January 19, 1976, reversing a

trial court judgment which had been entered on January 12, 1976. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

Reference to Reports

No decision rendered in this case has been reported. Two opinions of the trial court are appended (App. 8-15). The Supreme Court of Illinois has entered a minute order, a copy whereof is reprinted at App. 19, but has not yet delivered an opinion.

Grounds of Jurisdiction

This was a state proceeding brought by plaintiffs, as candidates for state judicial office, seeking to enjoin enforcement of Regulation 1975-2 of the Illinois State Board of Elections on the grounds, inter alia, that said regulation denied them due process, equal protection and political rights as guaranteed by the federal Constitution. On January 12, 1976 the trial court entered judgment in favor of these appellants. One week later, on January 19, 1976, that judgment was reversed by the Illinois Supreme Court. Notice of appeal was filed on January 27, 1976.

Jurisdiction to entertain this appeal is conferred by 28 U.S.C. §1257(2). The following decisions confirm this Court's jurisdiction and demonstrate that a substantial federal jurisdictional issue is presented: *Moore* v. *Ogilvie* (1969) 394 U.S. 814; *Abate* v. *Mundt* (1971) 403 U.S. 182; *Kusper* v. *Pontikes* (1973) 414 U.S. 51; *Weisberg* v. *Powell* (three-judge court, N.D. Ill. 1970) 314 S. Supp. 677, affirmed 398 U.S. 955; *Mann* v. *Powell* (three-judge court, N.E. Ill. 1971) 333 F. Supp. 1261; and *Netsch* v. *Lewis* (three-judge court, N.D. Ill. 1972) 344 F. Supp. 1280.

State Board of Election regulation 1975-2 was placed on file with the Illinois Secretary of State on December 3, 1975. It is not generally published. A copy of the regulation is appended as Appendix A (App. 1).

Questions Presented by the Appeal

Does the federally-protected right to equal treatment in the assignment of state ballot positions apply only to the top ballot position? Or does it apply to the second and successive positions as well, at least where more than one candidate will be elected to the same office?

Where a state system for assigning ballot positions increases the likelihood that politically-favored candidates will obtain the higher ballot positions, does that system deny due process, equal protection and political rights as guaranteed by the federal Constitution?

STATEMENT OF THE CASE

Plaintiffs are six of approximately sixty candidates for twenty-five circuit court judgeships created within Cook County, Illinois through recent enactment by the Illinois legislature.

Of the twenty-five contested judgeships, ten will be selected by the voters of the City of Chicago only, and fifteen by all the voters of Cook County.

Appellants seek nomination by the Democratic party. In response to a series of federal decisions discussed *infra*, Illinois law now provides that the names of candidates in primary elections will be arranged on the ballot in the order of their filing. Where multiple candidates file simultaneously, ballot position is settled by a lottery which

artificially establishes filing priorities among such simultaneous petitioners. (Smith-Hurd Annotated Illinois Statutes, Chapter 46, Section 7-12(6)).

The statute provides only that where petitions for nomination are filed simultaneously, "The State Board of Elections . . . shall break ties and determine the order of filing. . . ." The method of breaking ties is established by the appellee members of the State Board of Elections.

State law also provides for so-called "group" petitions, whereby a single set of nominators may, within a single document, propose a number of candidates for nomination by the same political party to compatible offices. S.H.A., Chapter 46 §7-10.

Regulation 1975-2 (published by the appellee Board members) provides that ties among contemporaneous filers shall be broken by lottery. The scheme is complicated, but provides essentially for the drawing of a number determined by the first letter of the candidate's surname. The order in which that number is drawn in the lottery determines ballot position. (App. 1, 2).

The challenged feature of Regulation 1975-2 provides that a single number will be drawn for a group petition; that the number is determined by the first letter of the surname of the first person named in the group petition; and that the ballot position thus drawn, and the next succeeding number of ballot positions equal to the number of candidates named in the group petition, shall be reserved for the group petitioners.

At the opening of the filing period, fourteen candidates filed contemporaneous petitions for Democratic nomination for the ten Chicago judgeships. One of these was appellant Cousins. Three other candidates filed individual petitions

for nomination. The remaining ten candidates joined in a single group petition under the sponsorship of the established party structure. Under the regulation, only five numbers would be drawn: One for each of the individual petitions, and one for the ten-person group petition.

Thus, the group petition can be drawn no lower than number 5. Wherever it is drawn, it will occupy ten successive spaces. It thus becomes mathematically impossible for appellant Cousins or any other individual candidate to obtain any of ballot positions 5, 6, 7, 8, 9 or 10. Since ten are to be nominated, appellants consider placement among the top ten to be desirable.

If each of the fourteen simultaneous filers were treated equally, each would have one chance in fourteen of being assigned to each of the fourteen top ballot positions.[1] If all candidates were treated equally, Appellant Cousins and each of the other thirteen simultaneous filers would have a 71.4% chance of being among the top ten names on the ballot.

But the regulation, as applied in this case, gives appellant Cousins only a 50% chance of being listed among the top ten on the ballot. With ten to be elected, a position among the top ten is deemed desirable by appellant.

The actual statistics, as depicted by Table II (App. 7), shows that Cousins (and each of the other individual filers) has one chance in five of being listed first; three chances in twenty of being listed second; one chance in ten of being listed third; and one chance in twenty of being listed fourth. They have no chance for any of the six remaining ballot positions among the first ten.

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[1] Two other persons filed separate petitions after the opening of filing. No lottery is necessary or appropriate as to them, and they will necessarily be given the fifteenth and sixteenth positions on the ballot.

Conversely, if all candidates were treated equally, Cousins and the other independent filers would have only a 28.6% chance of drawing numbers outside the top ten. The regulation, as applied in their case, increases their chance of falling outside the top ten to 50%. (See Table II, App. 7).

By contrast, the first six persons named in the organization group petition are absolutely assured of achieving one of the top ten ballot positions. Fully eight of the ten have a better chance for such placement than does appellant Cousins or any other independent candidate.

The situation of the remaining appellants is more complex, but their rights are no less certainly prejudiced. They petitioned for nomination to the fifteen judgeships to be elected on a county-wide basis. They were among thirty-four candidates who so petitioned simultaneously at the opening of the filing. Seventeen of those filers, including appellants, petitioned as individuals. The fifteen regular organization candidates joined in a group petition for those fifteen vacancies. (A second non-organization group petition was filed in which only two candidates joined.)

The results are shown by Table I in evidence (App. 5, 6). The first candidate named on the fifteen-person organization petition has about a 74.7% chance of being listed among the top fifteen candidates; the chance of each appellant for such listing is only about 47.3%. The first listed organization candidate cannot be lower than number 20 on the ballot, although any appellant can place as low as number 34. All of the first six organization candidates have a better chance for listing among the top fifteen, than does any appellant.

Trial Court Proceedings

The regulation was publicly filed on December 3, 1975 (App. 4). Subsequently, the lottery was scheduled for December 19. On December 16, the plaintiffs brought suit against the members of the State Board of Elections in the Circuit Court of Sangamon County (Springfield) Illinois, seeking a declaratory judgment that the regulation was unconstitutional on its face and as applied to them, and seeking an injunction against the conduct of the lottery by any means which would treat appellants differently from persons nominated by group petitions. The regular organization candidates named on the group petitions intervened as defendants.

On December 17, after hearing, the trial court entered a temporary restraining order in accordance with appellants' prayer. The order applied only to the offices in issue in the case. Accordingly, on December 19 the lottery was held to determine ballot position for other state offices, but the judgeships in issue here were expressly excluded from that lottery.

On December 29, after hearing evidence, the trial court entered a preliminary injunction substantially in accordance with the prayer of the complaint. On January 7, 1976 the trial judge delivered a memorandum opinion holding that the regulation as applied was discriminatory and lacking in impartiality, to the disadvantage of the plaintiffs. He also found that the intervenor organization candidates had a right to appear on the ballot as a coherent group; and that they could have exercised that right simply by filing one minute after the opening of the filing office. That action would have placed them as a coherent group immediately following all individual nominees who had filed at the opening of filing. The trial judge accordingly con-

cluded that each intervenor should be free to take his choice: To participate in the lottery as an individual; or to appear as a part of a coherent group consisting of all intervenors who so opted, with the group listing commencing immediately following the last of the names drawn in the lottery.

That was substantially in accord with the suggestion made by the intervening organization candidates. By their pleading, the organization candidates had argued that plaintiffs could be granted full relief while preserving coherence among the intervenors by simply withdrawing the intervenors from the lottery and considering them to have filed one minute after the 8:00 o'clock filing.

Defendants then moved for reconsideration. On January 12, 1976, the trial judge denied that motion and entered its judgment.

Proceedings on State Review

Within one week, the trial court's judgment had been reversed by the Illinois Supreme Court.

On January 13, defendants moved for permission to appeal directly to the Illinois Supreme Court. On January 14 (Wednesday) that motion was granted.[2] Briefs were ordered filed by Friday, January 16, and the case was set for oral argument on Monday, January 19. No evidence transcript was filed.

On January 19, following oral argument, the Illinois Supreme Court announced from the bench that the trial court judgment was reversed and remanded with directions to dismiss the complaint, and that an opinion would follow. That opinion has not yet been rendered.

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[2] Plaintiffs did not respond to that motion. By the time their Chicago counsel had received it, it had already been granted.

On January 27, plaintiffs filed their notice of appeal to this Court, together with a motion to stay mandate pending review by this Court. Ruling on that motion was deferred because Illinois Supreme Court Rule 361 extends to the respondent four days within which to file objections to motions. Meanwhile, on January 20, on its own motion, the Illinois Supreme Court ordered immediate mandate in the case.

On February 2, the motion for stay was denied.

The Federal Issue and Its Resolution

Plaintiffs' complaint was expressly grounded upon the theory that the challenged regulation denied to plaintiffs and the signers of their nominating petitions, due process and equal protection in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States; and the right of expression and of petition for redress of grievance secured by the First Amendment to said Constitution (Complaint, paragraphs 16 and 26).

The opinion of the trial judge granting relief to plaintiffs held that the regulation "is not constitutionally permissible under the facts herein" (App. 13). The trial judge did not specify the constitutional provisions involved. However, his opinion contained definitive internal reference to *Weisberg* v. *Powell,* 417 F. 2d 388; *Mann* v. *Powell,* 333 F. Supp. 1261; and *Netsch* v. *Lewis,* 344 F. Supp. 1280, decided on due process and equal protection grounds, which "plainly indicated that discrimination and favoritism in determining sequential ballot placement would not be tolerated." *Huff* v. *State Board of Elections* (1974), 57 Ill. 2d 74, 80.

The basis of the Illinois Supreme Court's ruling has not been expressed, since no opinion has yet been rendered. However, no claim of procedural insufficiency has been asserted against the plaintiffs at any stage, and it would appear logically impossible for the Illinois Supreme Court to predicate its ruling upon anything other than a substantive denial of the plaintiffs' constitutional claims.

The Federal Questions Are Substantial

> "To be sure, administration of the electoral process is a matter that the Constitution largely entrusts to the States. But, in exercising their powers of supervision over elections . . . the States may not infringe upon basic constitutional protections." *Kusper* v. *Pontikes,* (1973) 414 U.S. 51, 57.

The intervention of the federal judiciary to protect voting rights has been a matter of continuing necessity in Illinois. The federal courts have found it necessary to assure assistance to disadvantaged voters (*Puerto Rican Organization etc.* v. *Kusper,* N.D. Ill. 1972, 350 F. Supp. 606, *aff'd* 490 F. 2d 575); to prevent voting irregularities (*League of Women Voters* v. *Fields,* E.D. Ill. 1972, 352 F. Supp. 1053); to declare invalid an unfairly-conducted election and order a new election (*Ury* v. *Santee,* N.D. Ill. 1969, 303 F. Supp. 119); and in many other respects, to assure that voters and candidates receive fair treatment from the election officials.

For many years, the federal courts have attempted to enforce the constitutional rights of Illinois candidates to fairness in assignment of ballot position. Each mandate has been met with resistance, evasion and innovative attempts to preserve the inequities while arguably complying with the strict letter of the mandate.

Prior to 1969, ballot position for contemporaneous filers was assigned by the Secretary of State, who gave preference to "people that I knew". He deemed such precautions necessary because otherwise "I might be getting a Communist or somebody that's against our form of government". *Weisberg* v. *Powell* (7 Cir. 1969) 417 F. 2d 388, 391.

The *Weisberg* court, acting on the complaint of a candidate who lacked political sponsorship, enjoined such discriminatory assignments on equal protection grounds. *Weisberg, supra,* 417 F. 2d at 394.

The Illinois response was to enact legislation providing that petitions could be mailed as well as filed in person, and that where petitions were filed simultaneously, the Secretary of State "shall break ties and determine the order of filing, and such determination shall be conclusive." Enforcement of that statute was enjoined by a three-judge federal court on the ground that it "does not expressly preclude favoritism and discrimination." *Mann* v. *Powell,* (N. D. Ill. 1969) 314 F. Supp. 677, *aff'd.* 398 U.S. 955, further three-judge court consideration at 333 F. Supp. 1261. The procedures thus invalidated are summarized in 333 F. Supp. at 1264.

The *Mann* court struck down the new statute on the grounds that "it does not expressly preclude favoritism and discrimination by the Secretary of State in breaking ties." The court noted that it had previously enjoined certification of ballot position except by non-discriminatory means because the Secretary of State had threatened to employ personal favoritism or systematic bias in favor of incumbents in breaking ties." Nevertheless, under the purported authority of the statute and "allegedly in response

to this injunction," the Secretary had given the preferred ballot positions to incumbents and prior office holders, and had assigned the remaining positions alphabetically. *Mann*, 333 F. Supp. at 1264.

The Illinois legislature responded to the *Mann* injunction with substantial resourcefulness: It purported to deprive the Secretary of State of his authority to take arbitrary action, by mandating the same actions which he had theretofore taken arbitrarily. In short, he was ordered to show favoritism, and thus could no longer be accused of doing so arbitrarily. The legislature commanded assignment of preferred ballot position by incumbency and seniority, apparently reading *Mann* as denouncing administrative discretion rather than political favoritism.

In 1972, enforcement of that statute was duly enjoined by a three-judge federal court as violative of the earlier *Weisberg* and *Mann* decisions. *Netsch* v. *Lewis*, 344 F. Supp. at 1280.

A lottery method of assigning ballot position was then adopted. Potential candidates were notified that if they were present in the filing office at its opening, they would be included in the lottery. Thereafter, the Circuit Court of Cook County ruled that only those petitions filed by mail could be included in the lottery. On the appeal of the non-organization plaintiff in *Netsch* and others, that judgment was reversed by the Illinois Supreme Court. *Huff* v. *State Board of Elections* (1974), 57 Ill. 2d 74.

It seems completely realistic to suggest that the present scheme reflects the current Illinois device for avoiding the necessity for impartiality. The established party organization in Cook County has filed group petitions for all offices, the group being equal to the total number of va-

cancies. By that method, as previously discussed (pp. 5-6 *supra*), the opportunities of individual non-organization candidates for favorable ballot placement are very substantially decreased.

Consider the ten circuit court vacancies to be elected within Chicago. Fourteen candidates filed simultaneously: Four individuals, and the ten-person regular organization "group." But fourteen lottery ballots will not be drawn. Only five will be drawn—one for each petition, rather than one for each candidate. Elementary statistical analysis demonstrates conclusively that the effect of that procedure is to preclude any individual candidate from obtaining ballot positions 5 through 10. Their chances of being among the top ten (obviously significant, since ten are to be elected) are reduced from 71.4% to 50%.

Meanwhile, the first six persons named on the regular organization group petition are completely assured of placing within the top ten.

The same type of result is very likely to be reached whenever this procedure is adopted. Certainly, as shown by Table I (App. 5, 6), the chances of individual filers for favorable ballot placement are substantially and adversely affected—particularly measured against the persons at and near the top of the regular organization group petition—in a situation with fifteen judges to be elected county-wide and a total of thirty-four simultaneous filers.

That is not an attempt at fairness. It is an attempt to avoid fairness, and to extend to politically favored candidates the greatest advantage that the *Weisberg-Mann-Netsch* doctrine could arguably permit. It is a device to circumvent *Netsch*, just as the statute considered in *Netsch* attempted to evade *Mann*.

Several apologia were offered below. None is possessed even of arguable merit.

The defendants contended that the lottery determines only filing priority, not ballot position. But the only significance of filing priority is to determine ballot position. They also argued that priority is determined among petions, not among candidates. But it is only candidates who file such petitions. The group petition is not treated as an indissoluble unit. If it were found that some candidates named in the group petition were disqualified from office for any reason, the remaining candidates there named would be entitled to be listed on the ballot. The rights are those of individuals, not of groups. The Constitution protects voters and candidates, not petitions.

The defendants further contended that the challenged regulation actually enhanced the chance of an individual candidate to achieve the *first* ballot position. That argument, of course, is predicated upon the assumption that it is only the first ballot position which conveys an advantage. As applied to a race with ten or fifteen to be elected, that suggestion jars the ear of reason. At any event, the appellants sought equality rather than special advantage.

Another point made by the defendants below is that there is no statistical proof that ballot position will influence the result of election. But very strong proof was introduced that candidates believe it will. Literally hundreds of them went to great effort to be included in the lottery. They were not striving merely for first position—indeed, those persons listed as No. 2 and lower on group petitions had no chance whatever of being first. Obviously, they wanted to be as high as possible; and that is clear nonhearsay evidence that political candidates consider high ballot placement to be advantageous. Federal Rule of Evidence 801 (a).

The defendants pointed to the fact that in a state-wide race for convention delegate involving substantially more than 100 candidates, Adlai E. Stevenson III received the highest number of votes although listed toward the middle of the ballot. But that fact tends to show nothing more than that ballot position is not the *sole* determinant of the probability of success. Name recognition, personal popularity and extensiveness of campaign activity are also obviously important factors. It is quite impossible to say that Mr. Stevenson would not have received substantially more votes than he did, if his name had been listed third or tenth on that ballot rather than toward the middle. Thus, there are not and there can never be statistics of the type which the defendants demand as a condition precedent to impartiality in the assignment of ballot positions other than the first. But the fact that such statistics do not and can never exist, does not entitle the Illinois officials to treat all ballot positions other than the first in a discriminatory manner.

Both the *Weisberg* and *Mann* courts expressly found "that the order of listing candidates' names on the ballot can affect the outcome of an election, and that candidates have a right to equal protection in the allocation of ballot position." *Mann,* 333 F. Supp. at 1265. The Illinois officials now attempt to limit that doctrine to the first ballot position only, in a manner startlingly reminiscent of the first attempts to evade and limit the thrust of the *Mann* and *Weisberg* decisions. *Netsch, supra,* 344 F. Supp. 1280.

Given the historical background of the present litigation, it seems obvious that with respect to Illinois ballot placement, non-organization political candidates will be granted only those rights which the federal courts demand that they must have.

This Court has acted in the past to forbid election procedures which possess "a built-in bias tending to favor particular . . . political interests." *Abate* v. *Mundt* (1971) 403 U.S. 182, 185-186. Such actions "strike at the heart of democratic government." *Moore* v. *Ogilvie* (1969) 394 U.S. 814, 818.

We pray the corrective process of this Court, in the belief that few—if any—cases will present a more meaningful opportunity for vindication of the integrity of the American political process.

Respectfully submitted,

MELVIN B. LEWIS
Attorney for Plaintiffs

APPENDIX

APPENDIX A

STATE OF ILLINOIS
STATE BOARD OF ELECTIONS
REGULATION 1975-2

The lottery system to be used to break ties resulting from the simultaneous filing with the State Board of Elections of petitions for the same office shall be as follows:

1. The names of all candidates who filed simultaneously for the same office shall be listed alphabetically and shall be numbered consecutively commencing with the number one which shall be assigned to the candidate whose name is listed first on the alphabetical list; provided, however, that candidates filing a group petition for the same office shall be treated as one in the alphabetical listing using the name of the first candidate for such office to appear on the petitions as the name to be included in the alphabetical list. For example, if five candidates by the names of Downs, Brown, Edwards, Cook and Adams have filed simultaneously, they will be arranged alphabetically and assigned numbers as follows: Adams, one; Brown, two; Cook, three; Downs, four; and Edwards, five. However, if Cook and Adams filed a group petition and Cook's name appeared first on the petition, then the candidates would be arranged as follows: Brown, one; Cook and Adams, two; Downs, three; and Edwards, four.

2. All ties will be broken by a *single* drawing. A number shall be placed in a container representing each number assigned to each candidate and group of can-

didates pursuant to the alphabetical listing procedure set forth in paragraph 1 above. For example, if the largest number to be used for any office is five, then numbers one, two, three, four and five will be placed in a container. In this manner, sufficient numbers will be placed in the container to conduct a drawing for all offices at the same time.

3. After the numbers are placed in the container they shall be drawn one at a time from the container after they have been thoroughly shaken and mixed. The candidate or group of candidates in the position on an alphabetical list corresponding to the first number drawn shall be certified ahead of the other candidates listed on the alphabetical list. The candidate or group of candidates in the position on the alphabetical list corresponding to the second number drawn will be certified second and so forth until all numbers have been drawn. For example, where no group petitions were filed, if candidates Adams, Brown, Cook, Downs and Edwards filed simultaneously at 8:00 a.m. on the first day of filing, and the number three is the first drawn, then candidate Cook, who is listed in the third position on the alphabetical list, shall be certified first on the ballot. If the number one is drawn second, then candidate Adams, who is listed in the first position on the alphabetical list, shall be certified second on the ballot . . . and so on. For offices where group petitions were filed using the example set forth above where candidates Cook and Adams file a group petition for the same office, and Cook's name appears first on the petition, and number three is drawn first, then candidate Downs would be listed first. If the number two is drawn second, then candidates Cook and Adams would be certified second and third, respectively. If the number four is drawn third, then candidate Edwards would be certified fourth . . . and so on. In districts with fewer names on the alphabetical list than are in the drawing, then all numbers in excess of the number of candidates or group of candidates that paper on the particular alphabetical list shall be disregarded. Thus, if five numbers are placed in the container, and only four candidates or groups of candidates are on a particular list, then the number five shall be disregarded. In districts with fewer than four names, the numbers four and five shall be disregarded. In districts with fewer than three names, the numbers three, four and five shall be disregarded. For example, if candidates Adams and Cook filing separate petitions, are the only candidates listed on the alphabetical list and five numbers are chosen in the following order, 3, 5, 4, 2 and 1, then candidate Cook's name will appear in the certification prior to the name of candidate Adams.

4. All candidates shall be certified in the order in which petitions have been filed with the State Board of Elections. In cases where candidates have filed simultaneously, they shall be certified (in the order determined by the lottery procedure outlined above) prior

to candidates who filed for the same office who filed their petitions at a later time, except in those situations where the law requires rotation on a district-by-district basis.

Adopted by the Board November 21, 1975.

Franklin J. Lunding, Jr.
Franklin J. Lunding, Jr.
Chairman

ATTEST:
Jayne E. Price
Jayne E. Price
Chief Clerk

Filed Index Division, Dec. 3, 1975 in the Office of Secretary of State.
Emergency
Effective Dec. 3, 1975

APPENDIX B

TABLE I
(In Evidence)

JUDGE OF THE CIRCUIT COURT, COOK COUNTY JUDICIAL CIRCUIT
(15 to be nominated; 34 simultaneous filers)

A_1 through A_{15} represent the candidates who filed a group petition naming 15 candidates.

B_1 and B_2 represent the group petition filed on behalf of two candidates.

X represents the probabilities of *any* of the 17 candidates who filed individual petitions.

The probability in percentages of any candidate drawing any of the 34 possible ballot positions may be determined by reading down the column from the designation of the candidate to the corresponding position.

For example, the chance of any of the candidates filing individual petitions to obtain ballot position No. 15 is 1.3%. The chance of candidates A_1 through A_{14} of obtaining the same ballot position is 5.0%.

The percentages have been rounded off to the nearest tenth of a percent. For example, 4.97% is represented in the table as 5.0% and 5.26% is represented as 5.3%.

	X	A_1	A_2	A_3	A_4	A_5	A_6	A_7	A_8	A_9	A_{10}	A_{11}	A_{12}	A_{13}	A_{14}	A_{15}		B_2
1	5.3	5.3	0	0	0	0	0	0	0	0	0	0	0	0	0	0	5.3	0
2	4.7	5.0	5.3	0	0	0	0	0	0	0	0	0	0	0	0	0	5.0	5.3
3	4.4	5.0	5.0	5.3	0	0	0	0	0	0	0	0	0	0	0	0	4.7	5.0
4	4.2	5.0	5.0	5.0	5.3	0	0	0	0	0	0	0	0	0	0	0	4.4	4.7
5	3.9	5.0	5.0	5.0	5.0	5.3	0	0	0	0	0	0	0	0	0	0	4.1	4.4
6	3.6	5.0	5.0	5.0	5.0	5.0	5.3	0	0	0	0	0	0	0	0	0	3.8	4.1
7	3.4	5.0	5.0	5.0	5.0	5.0	5.0	5.3	0	0	0	0	0	0	0	0	3.5	3.8
8	3.1	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.3	0	0	0	0	0	0	0	3.2	3.5
9	2.9	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.3	0	0	0	0	0	0	2.9	3.2
10	2.6	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.3	0	0	0	0	0	2.6	2.9
11	2.4	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.3	0	0	0	0	2.3	2.6
12	2.1	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.3	0	0	0	2.0	2.3
13	1.8	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.3	0	0	1.8	2.0
14	1.6	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.3	0	1.5	1.8
15	1.3	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.3	1.2	1.5
16	1.4	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	1.2	1.2
17	1.4	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	1.2	1.2
18	1.4	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	1.2	1.2
19	1.4	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	1.2	1.2
20	1.3	5.3	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	1.5	1.2
21	1.6	0	5.3	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	1.8	1.5
22	1.8	0	0	5.3	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	2.0	1.8
23	2.1	0	0	0	5.3	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	2.3	2.0
24	2.4	0	0	0	0	5.3	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	2.6	2.3
25	2.6	0	0	0	0	0	5.3	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	2.9	2.6
26	2.9	0	0	0	0	0	0	5.3	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	3.2	2.9
27	3.1	0	0	0	0	0	0	0	5.3	5.0	5.0	5.0	5.0	5.0	5.0	5.0	3.5	3.2
28	3.4	0	0	0	0	0	0	0	0	5.3	5.0	5.0	5.0	5.0	5.0	5.0	3.8	3.5
29	3.6	0	0	0	0	0	0	0	0	0	5.3	5.0	5.0	5.0	5.0	5.0	4.1	3.8
30	3.9	0	0	0	0	0	0	0	0	0	0	5.3	5.0	5.0	5.0	5.0	4.4	4.1
31	4.2	0	0	0	0	0	0	0	0	0	0	0	5.3	5.0	5.0	5.0	4.7	4.4
32	4.4	0	0	0	0	0	0	0	0	0	0	0	0	5.3	5.0	5.0	5.0	4.7
33	4.7	0	0	0	0	0	0	0	0	0	0	0	0	0	5.3	5.0	5.3	5.0
34	5.3	0	0	0	0	0	0	0	0	0	0	0	0	0	0	5.3	0	5.3

APPENDIX C

TABLE II (In Evidence)

JUDGE OF THE CIRCUIT COURT, COOK COUNTY JUDICIAL CIRCUIT INSIDE THE CITY OF CHICAGO

(10 to be nominated; 14 Simultaneous filers)

CANDIDATES

Ballot Position	A1	A2	A3	A4	A5	A6	A7	A8	A9	A10	B	C	D	E
1	1-5	0	0	0	0	0	0	0	0	0	1-5	1-5	1-5	1-5
2	1-5	1-5	0	0	0	0	0	0	0	0	3-20	3-20	3-20	3-20
3	1-5	1-5	1-5	0	0	0	0	0	0	0	1-10	1-10	1-10	1-10
4	1-5	1-5	1-5	1-5	0	0	0	0	0	0	1-20	1-20	1-20	1-20
5	1-5	1-5	1-5	1-5	1-5	0	0	0	0	0	0	0	0	0
6	0	1-5	1-5	1-5	1-5	1-5	0	0	0	0	0	0	0	0
7	0	0	1-5	1-5	1-5	1-5	1-5	0	0	0	0	0	0	0
8	0	0	0	1-5	1-5	1-5	1-5	1-5	0	0	0	0	0	0
9	0	0	0	0	1-5	1-5	1-5	1-5	1-5	0	0	0	0	0
10	0	0	0	0	0	1-5	1-5	1-5	1-5	1-5	0	0	0	0
11	0	0	0	0	0	0	1-5	1-5	1-5	1-5	1-20	1-20	1-20	1-20
12	0	0	0	0	0	0	0	1-5	1-5	1-5	1-10	1-10	1-10	1-10
13	0	0	0	0	0	0	0	0	1-5	1-5	3-20	3-20	3-20	3-20
14	0	0	0	0	0	0	0	0	0	1-5	1-5	1-5	1-5	1-5

A1 through A10 represents the candidates on the group petition. B, C, D, E, represents the candidates who filed separate petitions.

The probability of a particular candidate drawing any of the 14 ballot positions may be determined by reading down in the column under the candidate to the specific ballot positions.

For example candidate A3 (the third candidate on the group petition) has one chance in five of drawing ballot position number 4, while candidate B has one chance in twenty of drawing ballot position number 4.

APPENDIX D

STATE OF ILLINOIS
CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
January 7, 1975
[Addressed to all counsel]
RE: Bradley, et al. v. Lunding, et al.
#730-75

Gentlemen:

I have considered the evidence and arguments of counsel, and the following is my opinion regarding the issues.

FACTS

The State Board of Elections on November 21, 1975, adopted Regulation 1975-2 which provides that where multiple candidates are named in a single nominating petition (group petition), their names are to appear on the primary ballot in the order in which they are listed in the petition as a coherent group. The Regulation provides that in conducting the lottery to break ties for simultaneous filings, the group petition is assigned one number in the lottery and each individual petitioner is given a number for the lottery.

The complaint herein was filed by 9 individual candidates for the Democratic nomination for Circuit Judge in Cook County. This is not a class action, but deals only with the offices named in the complaint, namely 10 newly created judgeships from the City of Chicago and 15 newly created judgeships from Cook County at large. The named defendants are the members of the State Board of Elections and its secretary. After the issuance of a temporary restraining order, this Court required that those candidates

who were listed in the group petitions for the offices in question and therefore directly affected be given notice of these proceedings. Thereafter, they were allowed to intervene as parties and have been heard. Brian Duff was granted leave to intervene as amicus curiae and has been heard. Allen Freeman has filed a petition to intervene, and although ruling on that petition was reserved and taken with the case, he has been heard.

The plaintiffs ask this Court to strike down State Board of Elections Regulation 1975-2 as applied to these facts as a violation of plaintiffs' constitutional rights. It is forcefully argued: (1) that the drawing in the lottery for simultaneous filings of the group as one with the names of the individuals as one is a disadvantage to them with a corresponding advantage to the members of the group and (2) that the Regulation permitting the group petition names to be kept together on the ballot reflects a policy of intentional and purposeful discrimination against the individuals because the group which was endorsed by the Democratic Central Committee is thereby identifiable on the ballot.

I

Statistical proof was offered that the individual plaintiffs are disadvantaged by a lottery which draws some individuals and some group or groups. For example, in the Democratic primary for 10 judgeships, there are 4 individual candidates and a group of 10 who tied for first filing. There are also candidates who filed after the 14 persons who filed as of 8 A.M. on the first filing date. In this case, if the 14 individuals are drawn by lot, each has a 1 in 14 chance of being in any given ballot placement, including first position. On the other hand, if the lottery is conducted pursuant to State Board of Elections Regulation 1975-2, we have the 4 individuals and one group of 10. The odds

are obviously changed. Now each individual has a 1 in 5 chance of first position (a much better chance for the individuals), a 3 in 20 for 2nd position, a 1 in 10 chance for 3rd, a 1 in 20 chance for 4th, no possibility for positions 5 through 10, a 1 in 20 for 11th, a 1 in 10 for 12th, and 3 in 20 for 13th, a 1 in 5 for 14th.

It is clear from these statistics that when the Regulation is applied, the chance of each individual gaining ballot positions 1, 2 and 3 is improved, while his chance of being in 4th position is decreased. The chance of the individual being in ballot position 5 through 10 is eliminated, etc.

Looking at it from another viewpoint, if the first 10 ballot positions are assumed to be preferred where 10 are to be nominated from a large field of candidates, then the Regulation 1975-2 decreases the individuals' probabilities of being within the first 10 positions from 71.6% to 50%. Conversely, the Regulation guarantees the first 6 candidates on the group petition being within the first 10 positions.

In *Huff* v. *State Board of Elections,* 57 Ill.2d 74, the Illinois Supreme Court held that the sequential order of candidates' names on the ballot must be by lot, or other nondiscriminatory method. The Court said:

> "It [the statute] was endeavoring to provide a fair and impartial means of determining the order in which nominating petitions were to be considered filed so that ballot placement could be settled on a nondiscriminatory basis. Such legislation was mandated by the decisions in Weisberg v. Powell, 417 F.2d 388; Mann v. Powell, 333 F.Supp. 1261; and Netsch v. Lewis, 344 F. Supp. 1280. These decisions plainly indicated that discrimination and favoritism in determining sequential ballot placement would not be tolerated."

Representative Duff qualified as an expert and testified that, in his opinion, only the first and last ballot position

was an advantage to a candidate. Also, the results of the 1964 "bedsheet" legislative ballot were introduced into evidence (over strong objection as to relevance) which showed, among other things, that the high vote getters appeared not usually in first or last position.

But is seems to me that there can be no convincing scientific or empirical evidence of the effect of ballot placement on the vote a candidate receives. The argument that first place is the only position of value may very well be true. But because there are so many factors and variables in the voting process, it simply cannot be proved or disproved. It may also well be true that it is an advantage to be among the first ten candidates on the party nominating ballot where there is a crowded field with the ten receiving the most votes to be nominated. But again, it can neither be proved nor disproved. The argument that plaintiffs must prove they have been harmed to justify relief must fail.

In conclusion, it is my opinion that State Board of Elections Regulation 1975-2 as applied to these facts violates the rule of *Huff* and cannot be applied to permit the group to be treated as one for breaking the tie for first place positions by lottery. This conclusion is not based on which position is best on the ballot but, rather, that the "impartiality" requirement of *Huff* has not been met.

II

The argument that the candidates on the group petition may not lawfully or constitutionally be kept as a coherent group on the ballot is unconvincing to me. No specific law prohibits it. No rule of logic or requirement for fundamental fairness dictates such a judicial holding (provided, of course, the maintenance of the coherent group does not

conflict with another's constitutional or legal rights as in the case of a lottery to break ties with individuals).

I need not denominate the nature of the right to coherent grouping. It has been argued on the one hand that it is not constitutionally permissible, and on the other that it is a basic constitutional right. Suffice it to say that coherency is not prohibited unless to maintain it violates the rights of others.

III

The ruling herein requires that all those candidates in this case who tied for first filing position must be treated individually for the purpose of conducting the lottery to break the tie.

However, it needs no citation of authority to support the proposition that those on the group petition may waive their right to be considered in the lottery for first positions. This result is even more compelling when it is considered that State Board of Elections Regulation 1975-2 was in force at the time of filing the joint petitions which allowed the coherent grouping, as well as participation in the lottery. This Court cannot hold that the group may not now accomplish what they could have easily accomplished by filing the group petition at 8:01 A.M. To hold that the candidates on the group petition *must* participate individually in the lottery and thereby lose their coherent grouping would be to impose an unfairness upon them by reason of Regulation 1975-2. I cannot allow Regulation 1975-2 to prejudice the rights of plaintiffs, but neither should I allow its adoption to prejudice the rights of intervening defendants. Waiver is the thrust of intervening defendants' affirmative defense and, therefore, that defense is allowed. The intervening defendants must be given the next succeeding ballot positions after the individuals who participate in the lottery for first positions.

IV

I have considered the petition of counsel for Allen Freeman to intervene, and the issues in that petition seem to me to be sufficiently different from the issues in this case that the motion to intervene should and must be denied.

SUMMARY

State Board of Elections Regulation 1975-2 provides that group nominating petitions shall be considered as one number in the lottery to break ties for first positions. The Regulation further provides that the names on a group petition shall be kept in sequential order on the ballot (the group is then coherent and identifiable on the ballot).

In my opinion, a lottery with the group as one number is not constitutionally permissible under the facts herein, for it changes the odds in the drawing and, therefore, is not fair and impartial.

It is further my opinion that it is constitutional to keep the group together on the ballot, even though doing so means that they are identifiable. This is true only where to do so does not infringe on the rights of other candidates.

Since the groups in this case have waived their right to participate in the lottery for first positions by their pleadings, they are ordered placed on the ballot after those otherwise tied for first position.

Attorney Cassidy is directed to prepare an appropriate order in accordance herewith.

Very truly yours,
J. Waldo Ackerman
J. WALDO ACKERMAN
Circuit Judge

JWA:jah

APPENDIX E

STATE OF ILLINOIS
CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
January 12, 1976
[Addressed to all counsel]

RE: Bradley, et al. v. Lunding, et al.
#730-75

Gentlemen:

I have carefully considered your motion to reconsider my opinion of January 7, 1976, based on *McCoy* v. *Mayer*, 333 F. at 151, which is claimed to be controlling this case.

As you know, stare decisis applies only where the same issue was directly decided after direct argument on the point in issue; further stare decisis does not apply if the decision relied on is of a sister state or a federal court considering the law of another state or of the District of Columbia. Under either test the case cited is not controlling here.

I would, of course, consider *McCoy* to be persuasive in logic if it had squarely and directly addressed the question; however, it did not. The motion to reconsider is accordingly denied.

In argument on the motion to reconsider for the first time it was alleged that the opinion in this case would have far-reaching implications in other factual situations.

I restate that the opinion and order in this case is specifically limited to the facts and office before me, and is not meant to extend to any other office or factual situation.

In view of the suggestion that this opinion has ramifications not fully argued or considered in this court, it is appropriate to enter a stay order so that the parties will have an opportunity to present this case to a reviewing court.

Ordinarily a trial court should not strike down a statutory regulation of a governmental agency, particularly where that action will have far-reaching effects, without careful consideration of all the facts and the consequences of such an order. To obviate confusion such a ruling should better be left to a court of last resort. On the other hand, the plaintiffs have a right to the conscientious and honest consideration of the merits of their case by this court. To accommodate both concepts, this order is stayed until a reviewing court has an opportunity to consider the case itself on the merits or until that court considers and acts on whatever stay order, if any, it feels is appropriate. However, if for any reason a reviewing court has not taken action by the last date possible to hold the lottery and certify the ballot positions of plaintiffs, then the stay order is automatically dissolved and defendants are ordered to conduct the lottery in accordance with the order entered herein.

Very truly yours,
J. Waldo Ackerman
J. WALDO ACKERMAN
Circuit Judge

JWA:df

APPENDIX F

IN THE CIRCUIT COURT FOR THE
SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

730-75

PAUL BRADLEY, et al.,

Plaintiffs,

-vs-

FRANKLIN J. LUNDING, JR., Chairman, State Board of Election Commissioners, WILLIAM L. HARRIS, Vice Chairman, DON W. ADAMS, MICHAEL E. LaVELLE and JAYNE E. PRICE, Chief Clerk,

Defendants.

ORDER

This cause coming on to be heard on the Amended Complaint for Injunction and Declaratory Judgment of the Plaintiffs, Paul Bradley, et al., by their attorneys, Charles J. Gramlich and Melvin B. Lewis, and the Defendants, Franklin J. Lunding Jr., Chairman, State Board of Election Commissioners, William L. Harris, Vice Chairman, Don W. Adams, Michael E. LaVelle and Jayne E. Price, Chief Clerk appearing by their attorney, Michael Levinson, and the intervening Defendants, John A. McElligott, Aubrey F. Kaplan, Arthur J. Cieslik, Jerome Larner, Francis J. Mahon, Howard M. Miller, Marilyn Rozmarek Komosa, Adam N. Stillo, R. Eugene Pincham, Mary Ann Grohwin McMorrow, Richard L. Samuels, Gerald L. Sbarboro, Theodore M. Swain, Anthony J. Scotillo and James A. Zafiratos and John H. McCollom, Sylvester C. Close,

William E. Peterson, John F. Reynolds, Raymond S. Sarnow, Raymond C. Sodini, James Traina, Jose R. Vazquez, Rudolph L. Janega and Warren D. Wolfson by their attorney, Jack Cassidy, and the Court having heard the arguments of counsel for the parties and counsel for amicus curiae, the Court finds:

1. That statistical proof offered by the individual Plaintiffs shows that a lottery conducted for the purpose of assigning ballot positions wherein one number is assigned to each group petition and one number is assigned to each individual changes the odds in the facts of the case each individual and each member of the group has in obtaining each ballot position; that changing those odds for ballot positions by the regulation in question makes the lottery not impartial or fair and equal and, therefore, the same is invalid as applied to the facts in this case.

2. That a lottery conducted pursuant to Regulation 1975-2 of the State Board of Elections, as applied to the facts before the Court in this suit is not a proper vehicle for the assignment of ballot positions.

3. That the right of an individual to associate with others in a group petition for an elective office is permissible.

4. All persons whose petitions are deemed filed simultaneously in this case must be treated individually for the purpose of conducting the lottery to break the resulting tie for first place unless those individuals voluntarily waive said rights in order to remain together as a group and to assume a position beneath the individual petitioners.

5. The intervening Defendants, by their affirmative defense, have elected to remain together as a coherent group rather than participate in a lottery for first place;

that this election is not a waiver of the other legal positions of said intervenors.

6. The Petition for Leave to Intervene filed by Allen Freeman contains issues sufficiently different from the issues in this case that the Petition for Intervention is denied.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. That a lottery be conducted to break the tie for first place among those individuals filing simultaneously.

2. That those persons whose names appear on a group petition be permitted to remain together in a group on the ballot provided that their petition shall be deemed to have been filed after the individual petitioners and provided further that any person whose name appears on a group petition may withdraw his name from the petition and join the lottery as an individual to be conducted for the purpose of determining the respective ballot positions, and provided further that in the race wherein two group petitions have been filed simultaneously, that a separate lottery be conducted for the purpose of determining which group petition shall appear before the other.

The effect of this decision is limited to those persons who have joined in this law suit.

3. This order is stayed until a reviewing court may consider the case; however, if a reviewing court has not considered this case by the last possible date for Defendant State Board of Elections to hold the lottery and certify the candidates in this case, then this stay order is automatically dissolved and Defendant State Board of Elections is ordered to comply with this order.

DATED: January 12, 1976

J. WALDO ACKERMAN/SS

APPENDIX G

UNITED STATES OF AMERICA

Statae of Illinois)
) ss.
Supreme Court)

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the twelfth day of January in the year of our Lord, one hundred nine hundred and seventy-six, within and for the State of Illinois.

PRESENT: DANIEL P. WARD, CHIEF JUSTICE
JUSTICE WALTER V. SCHAEFER
JUSTICE THOMAS E. KLUCZYNSKI
JUSTICE HOWARD C. RYAN
JUSTICE ROBERT C. UNDERWOOD
JUSTICE JOSEPH H. GOLDENHERSH
JUSTICE CASWELL J. CREUS
WILLIAM J. SCOTT, ATTORNEY GENERAL
ATTEST: CLELL L. WOODS, CLERK

BE IT REMEMBERED, that, to-wit: on the 19th day of January, A.D. 1976, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

Paul Bradley, et al.,

Appellees

No. 48178 vs.

Franklin J. Lunding, Jr., Chairman, State Board of Elections Commissioners, William L. Harris, Vice Chairman, Don W. Adams, Michael E. Lavelle and Jayne Price, Chief Clerk,

Appellants

John A. McElligott, Aubrey F. Kaplan, Arthur J. Cieslik, Jerome Larner, Francis J. Mahon, Howard M. Miller,

Marilyn Rozmarek Komosa, Adam N. Stillo, R. Eugene Pincham, Mary Ann Grohwin McMorrow, Richard L. Samuels, Gerald L. Sbarboro, Theodore M. Swain, Anthony J. Scotillo, James A. Zafiratos, John H. McCollom, Sylvester C. Close, William E. Peterson, John F. Reynolds, Raymond S. Sarnow, Raymond C. Sodini, James Traina, Jose R. Vazquez, Rudolph L. Janega and Warren D. Wolfson,

Appellants

Appeal from Circuit Court Sangamon County
730-75

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the judgment aforesaid, there is manifest error.

THEREFORE, it is considered by the Court that for that error and others in the record and proceedings aforesaid the judgment of the Circuit Court of Sangamon County, in this behalf rendered, BE REVERSED, ANNULLED, SET ASIDE AND WHOLLY FOR NOTHING ESTEEMED, and this cause be remanded to the Circuit Court of Sangamon County with directions to dismiss the complaint.

And it is further considered by the Court that the said appellants recover of and from the said appellees costs by them in this behalf expended, to be taxed, and that they have execution therefor.

I, CLELL L. WOODS, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court this 20th day of January, A.D. 1976.

Clell L. Woods Clerk,
Supreme Court of the State of Illinois

APPENDIX H

(Filed on January 27, 1975, in both the Supreme Court of Illinois and the Circuit Court of Sangamon County, Illinois)
NO. 48178
IN THE
SUPREME COURT OF ILLINOIS

PAUL BRADLEY, et al,
Plaintiffs-Appellees,
vs.
FRANKLIN J. LUNDING, JR., Chairman, State Board of Elections Commissioners, et al,
Defendants-Appellants

Appeal from the Circuit Court for the Seventh Judicial Circuit (Sangamon County, Illinois)
There docketed as Cause No. 730-75

Honorable J. Waldo Ackerman, Judge Presiding

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

1. Notice is hereby given that PAUL BRADLEY, RONALD C. SMITH, CHARLOTTE ADELMAN, PATRICK J. HUGHES, SHELVIN SINGER, and WILLIAM COUSINS, as plaintiffs-appellants herein (plaintiffs-appellees in the Illinois Supreme Court), hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Illinois, reversing the judgment of the Circuit Court for the 7th Judicial Circuit (Sangamon County, Illinois) and remanding the cause with directions to dismiss the complaint. Said judgment was entered by the Supreme Court of Illinois in this proceeding on January 19, 1976.

This appeal is taken pursuant to 28 USC §1257(2).

2. The Clerk of the Supreme Court of Illinois will please prepare a transcript of the record in the cause, for transmission to the Clerk of the Supreme Court of the United States, and include therein all portions of the trial court record which were on file with the Supreme Court of Illinois at the time the judgment of January 19, 1976 was entered; all motions filed and orders entered in said cause subsequent to that time; and this Notice of Appeal.

The Clerk of the Circuit Court for the 7th Judicial Circuit (Sangamon County, Illinois) will please prepare a transcript of record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript all pleadings filed by any party; the report of proceedings at the trial; the trial court opinion; and the trial court judgment.

3. The following questions are presented by this appeal:

A. Where a candidate seeks one of several available nominations to the same multiple-officer state position in a primary election at which both state and federal officers are to be nominated, and where state officers assign ballot position by a procedure which effectively assures relatively high ballot position to some candidates who have been endorsed by the established party organization while diminishing or extinguishing the opportunity for other equally qualified candidates to achieve most of the higher ballot positions, then,

1. Is such action a denial of equal protection of the laws contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States?

2. Is such action a denial of due process of law, contrary to the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States?

3. Is such action a denial of the right to political petition contrary to the provisions of the First and Fourteenth Amendments to the Constitution of the United States?

4. Does such action violate the candidate's constitutional right to require state officers to exercise total impartiality in the assignment of ballot positions?

B. If several persons are to be nominated for such position, but the number of candidates exceeds the number of available nominations, is the right (if any) of a candidate to equal treatment in the assignment of ballot positions limited to the first position only?

C. Does a candidate for nomination to state office have a federally protected right to equal treatment in the assignment of ballot position?

D. If a state candidate cannot prove that a measurable loss of probability of election will result from a procedure whereby his chances for high ballot position (other than the first position) are diminished or extinguished, are state officers free of all constitutional restrictions in the method of assignment of such position?

/s/ *Melvin B. Lewis*
Melvin B. Lewis,
Attorney for Paul Bradley,
Ronald C. Smith, Charlotte Adelman,
Patrick J. Hughes, Shelvin Singer and
William Cousins, Appellants
315 S. Plymouth Court
Chicago, Illinois 60604
(312) 427-2737

PROOF OF SERVICE

I, Melvin B. Lewis, attorney of record for Paul Bradley, Ronald C. Smith, Charlotte Adelman, Patrick J. Hughes, Shelvin Singer and William Cousins, appellants herein, do hereby certify that on January 26, 1976 I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the following named persons: Charles Gramlich, Michael Levinson, John E. Cassidy, Jr., Richard A. Hollis, Thomas Londrigan, M. E. Lavelle, Brian Duff and Gerald Shea, by depositing a copy thereof, contained in a sealed envelope addressed to each such person with prepaid first-class postage affixed thereto, in an authorized depository for United States Mail at Chicago, Illinois.

The undersigned is a member of the bar of the Supreme Court of the United States.

/s/ *Melvin B. Lewis*

MAR 15 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1146

PAUL BRADLEY, WILLIAM COUSINS, PATRICK J. HUGHES, RONALD C. SMITH, CHARLOTTE ADELMAN, SHELVIN SINGER,

Plaintiffs-Appellants,

vs.

FRANKLIN J. LUNDING, JR., Chairman, State Board of Elections, WILLIAM L. HARRIS, Vice Chairman, DON W. ADAMS, MICHAEL E. LAVELLE and JAYNE PRICE, Chief Clerk,

Defendants-Appellees,

JOHN A. McELLIGOTT, AUBREY F. KAPLAN, ARTHUR J. CIESLIK, JEROME LERNER, FRANCIS J. MAHON, HOWARD M. MILLER, MARILYN ROZMAREK KOMOSA, ADAM N. STILLO, R. EUGENE PINCHAM, MARY ANN GROHWIN McMORROW, RICHARD L. SAMUELS, GERALD L. SBARBORO, THEODORE M. SWAIN, ANTHONY J. SCOTILLO, JAMES A. ZAFIRATOS, JOHN H. McCOLLOM, SYLVESTER C. CLOSE, WILLIAM E. PETERSON, JOHN F. REYNOLDS, RAYMOND S. SARNOW, RAYMOND C. SODINI, JAMES TRAINA, JOSE R. VAZQUEZ, RUDOLPH L. JANEGA and WARREN D. WOLFSON,

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Appeal from the Supreme Court of Illinois

MOTION TO DISMISS OR AFFIRM

FRANKLIN J. LUNDING, JR.,
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KEENAN PRINTING COMPANY 365

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. ——

PAUL BRADLEY, WILLIAM COUSINS, PATRICK J. HUGHES, RONALD C. SMITH, CHARLOTTE ADELMAN, SHELVIN SINGER,

Plaintiffs-Appellants,

VS.

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MOTION TO DISMISS OR AFFIRM

NOW COMES the Defendants-Appellees in the above-entitled cause, and respectfully move this Honorable Court, pursuant to Rule 16 of the Rules of the Supreme Court of the United States to dismiss the appeal on the ground that the question does not present a substantial federal question, or alternatively, that the judgment of the Illinois Supreme Court be affirmed since it is predicated on substantial judicial precedent.

OPINION BELOW

The opinion of the Supreme Court of Illinois is appended to the Jurisdictional Statement.

STATEMENT OF THE CASE

The question on appeal is the constitutionality of Regulation 1975-2 of the Illinois State Board of Elections (Appendix). The Regulation has been attacked as denying Plaintiffs due process, equal protection and political rights as guaranteed by the Constitution of the United States.

Plaintiffs sought to have Regulation 1975-2 declared unconstitutional, and to enjoin its enforcement. The Circuit Court of Sangamon County declared it to be unconstitutional and on appeal, the Illinois Supreme Court reversed and remanded the cause to the Circuit Court of Sangamon County with directions to dismiss the complaint.

Plaintiffs filed a Notice of Appeal to the Supreme Court of the United States and a Jurisdictional Statement.

ARGUMENT

I.

THE QUESTION PRESENTED DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The purpose of Regulation 1975-2 of the State Board of Elections is to provide a non-discriminatory and fair method of determining the order of filings of petitions where simultaneous filings have occurred. The method of determining which of simultaneously filed petitions to be listed first is by lottery. The Regulation, as a consequence, provides an equal and fair opportunity to all candidates to obtain optimum ballot position. The Regulation permits candidates to file group petitions or to file single petitions.

This Honorable Court has held that the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, does not make every minor difference in the application of laws to non-homogeneous groups a violation of the Constitution. In determining whether or not state action violates the Equal Protection Clause, a Court must consider the facts and circumstances behind the law, the interest which the state claims to be protecting, and a balancing of the interests of those who may be disadvantaged by the classification. See *William* v. *Rhodes,* 393 U.S. 23 (1968).

Permitting slates of candidates to affiliate together by listing them on the ballot as a group is beneficial to the voter for it increases voter identification on the candidates so affiliated. A ballot should be arranged to allow a voter to intelligently select those candidates of his choice; not to mislead them. Where this can be achieved without arbi-

trarily giving some candidates preferential ballot positions, a legitimate state interest is served.

The right of association has long been recognized by this court as an inherent constitutional right. *Cousins* v. *Wigoda,* 95 S. Ct. 541 (1975), *Kusper* v. *Pontakes,* 414 U.S. 51 (1973).

In *Cousins,* the court citing *Kusper,* stated (547):

> "The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom."

Laws of other jurisdictions permitting slates of candidates to appear together on the ballot have been consistently sanctioned by the courts.

In *McCoy* v. *Mayer,* 333 F. 2d 151, (C.A., D.C., 1964), the Court upheld the validity of a Regulation enacted by the Board of Elections of the District of Columbia which provided for a lottery, wherein a single candidate was in competition with a group of candidates listed on one petition. This regulation provided that the names of candidates nominated as a slate shall be listed on the ballot in the same order in which their names appear on the first page of their nominating petitions. The regulation further provided that the order in which the names and slates of candidates for office appear on the ballot shall be determined by a lottery.

In *Quaremba* v. *Allen,* 334 A. 2d, the Superior Court of New Jersey, 1975, held that the statute, requiring that members of a group of primary candidates who file a joint petition be placed on the same line of voting machine, did not violate the constitutional rights of candidates who did not file joint petitions.

Candidates appearing as a slate have a fundamental constitutional right of free political association. There is a legitimate interest of the state in protecting the rights of these candidates, as well as the signers of nominating petitions for such candidates to appear together on the ballot. In *Farrington* v. *Falcey,* 233 A. 2d 185 (Superior Court of New Jersey, Appellate Division, 1967), the court held a political parties' regularly designated candidates filing joint nominating petitions for a primary election have a right to appear jointly on the ballot.

Regulation 1975-2 of the State Board of Elections neither promotes nor discourages the slating of candidates but is objectively neutral. The candidates' election to file separate or group petitions is made by them voluntarily, by their own free and deliberate choice.

The State Board of Elections, through its interpretation and application of the various statutory provisions, case decisions and the adoption and promulgation of Regulation 1975-2, have provided a method whereby all candidates have an equal, fair and reasonable opportunity to determine ballot position when petitions are simultaneously filed.

The State Board of Elections must certify candidates, including candidates for group offices, to the County Clerks as required by Section 7-12 of the Elections (Ill. Rev. Stat. 1975, Ch. 46, Par. 7-12). The entire statutory scheme of the Illinois Election Code focuses on petitions in terms of circulation, signatures, filing and certification. Nowhere in the Election Code is there any authority for the State Board of Elections to break up the slates or coalition of candidates as they appear on petitions for nominations.

Additionally, there is no authority to require as a condition of participating in a lottery, candidates on a slate

must waive their right to remain together with other candidates as a group on the ballot. Nor is there any authority that to remain as a group on the ballot, such group candidates must appear on the ballot below candidates filing individual or single petitions.

II.

THE JUDGMENT OF THE ILLINOIS SUPREME COURT IS BASED ON *ESTABLISHED PRINCIPLES OF LAW.*

On January 19, 1976, the Illinois Supreme Court held that Regulation 1975-2 of the State Board of Elections to be constitutional.

In *Huff* v. *State Board of Elections,* 57 Ill. 2d 74 (1974), the Supreme Court of Illinois required that the order of listing candidates on ballots must be determined by a non-discriminatory method. At issue in *Huff* was whether the State Board of Elections' Regulation 1973-2, which provided the same criteria for petitions that are considered to be filed simultaneously, was fair and impartial, and pursuant to the statutory authority granted to the Board. The Court held the regulation to be fair and impartial and within the statutory authority of the Board.

To require slates of candidates to be listed after all candidates participating in the lottery and before all other late filing candidates is to discourage and penalize candidates from forming slates. Further, it would deny these groups equal protection of the laws.

III.

PLAINTIFF'S CONSTITUTIONAL RIGHTS ARE FULLY PROTECTED BY REGULATION 1975-2 OF STATE BOARD OF ELECTIONS AND THE ELECTION STATUTES.

In order to establish a denial of equal protection of the law, under the Fourteenth Amedment to the Constitution of the United States, one must prove the existence of an intentional or purposeful discrimination; one in which one class is favored over another. *Snowden* v. *Hughes,* 321 U.S. 1, 7 and *Bohus* v. *Board of Election Commissioners,* 447 F. 2d 221 (C.A. 7th 1971).

The constitutionality of Regulation 1975-2 of the State Board of Elections was again challenged in the Federal District Court in Illinois in the case of *Baum* v. *Lunding,* 76 C 261 (N.D. Ill. 1976).

In *Baum,* the Plaintiff who is a candidate for Circuit Court judge, requested that: a three-judge court be convened; a declaratory judgment be entered declaring that Regulation 1975-2 of the Illinois State Board of Elections is unconstitutional; and, that an injunction be entered enjoining state and local election officials from assigning ballot positions pursuant to the operation of said Regulation.

The *Baum* court stated:

> "Under § 7-14, Illinois has selected a filing procedure *which enables persons who wish to be listed together* to simply line up at the same time, or in effect, give their voter petitions to one person who would drop them all off at once, in any order, whatever his rank in filing them happens to be. The fact that all names are on one petition, or that an order is specified on that one petition does not enhance this contingency, for the lone person dropping off the petitions could physically hand them to a clerk one at a time, in the order the candidates prescribed to him. Consequently, the fact that a lottery preserves this order cannot be said to be the cause of any discrimination. As a non-discriminatory manner of breaking ties for the time of filing, the lottery merely restates a physical reality which has not been challenged as constitutionally violative." (p. 9)

The District Court denied the motion to convene a three-judge court and sustained the motion to dismiss. The Court held:

> "[T]hat no cognizable discrimination is in fact occurring through the use of the regulation. Consequently, it is unnecessary to determine the presence of either kind of justifying state interest, and no substantial constitutional question has been presented." (P. 9)

And, in considering the effect of a regulation as it relates to ballot position, stated:

> "The remaining equal protection claim to be examined is whether the regulation favors the persons listed at the top of the group, statistically, over individual candidates. For this purpose, the court assumes, even in the absence of clear allegation in either complainat that there may be some advantage to candidates with higher position on the ballot. * * * As to these there is no statistical advantage garnered by the lottery. Each group contains within it persons who have greater and lesser chances of being near the top of the ballot. As against the entire group, however, no individual is disadvantaged statistically. If anything, individuals are pushed to the extreme of the ballot, that is, either to the top or the bottom, on the average, a situation which has elsewhere been characterized as *advantageous.*" (pp. 9-11)

The issues in this cause have been resolved in the Illinois Supreme Court and the United States District Court for the Northern District of Illinois, Eastern Division. Both courts have correctly held that Regulation 1975-2 of the State Board of Elections is not a violation of either the Equal Protection of the Laws or Due Process clauses of the Constitution of the United States. Accordingly, the decision of the Illinois Supreme Court should be affirmed.

CONCLUSION

In view of the foregoing, the Defendants-Appellees respectfully pray that the appeal be dismissed or, in the alternative, that the decision of the Illinois Supreme Court be affirmed.

Respectfully submitted,

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March 12, 1976

APPENDIX

APPENDIX

STATE OF ILLINOIS }
COUNTY OF COOK } SS.

AFFIDAVIT OF SERVICE

I, MICHAEL McCLELLAND, depose and say that I am a clerk in the office of Michael L. Levinson, one of the attorneys of record for FRANKLIN J. LUNDING JR., WILLIAM L. HARRIS, DON W. ADAMS, MICHAEL E. LAVELLE and JAYNE PRICE, Defendants-Appellees herein, and that on March 10, 1976, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Motion To Dismiss Or Affirm on each of the parties required to be served herein, as follows:

On, PAUL BRADLEY, WILLIAM COUSINS, PATRICK J. HUGHES, RONALD C. SMITH, CHARLOTTE ADELMAN, SHELVIN SINGER, Plaintiffs-Appellants herein, by mailing the copies in a duly addressed envelope, with first class postage prepaid, to MELVIN B. LEWIS, counsel of record for said Plaintiffs-Appellants, at his office at 315 S. Plymouth Court, Chicago, Illinois 60604.

STATE OF ILLINOIS
STATE BOARD OF ELECTIONS
REGULATION 1975-2

The lottery system to be used to break ties resulting from the simultaneous filing with the State Board of Elections of petitions for the same office shall be as follows:

1. The names of all candidates who filed simultaneously for the same office shall be listed alphabetically and shall be numbered consecutively commencing with the number one which shall be assigned to the candidate whose name is listed first on the alphabetical list; provided, however, that candidates filing a group petition for the same office shall be treated as one in the alphabetical listing using the name of the first candidate for such office to appear on the petitions as the name to be included in the alphabetical list. For example, if five candidates by the names of Downs, Brown, Edwards, Cook and Adams have filed simultaneously, they will be arranged alphabetically and assigned numbers as follows: Adams, one; Brown, two; Cook, three; Downs, four, and Edwards, five. However, if Cook and Adams filed a group petition and Cook's name appeared first on the petition, then the candidates would be arranged as follows: Brown, one; Cook and Adams, two; Downs, three; and Edwards, four.
2. All ties will be broken by a *single* drawing. A number shall be placed in a container representing each number assigned to each candidate and group of candidates pursuant to the alphabetical listing procedure set forth in paragraph 1 above. For example, if the largest number to be used for any office is five, then numbers one, two, three, four and five will be placed in a container. In this manner, sufficient numbers will be placed in the container to conduct a drawing for all offices at the same time.

3. After the numbers are placed in the container they shall be drawn one at a time from the container after they have been thoroughly shaken and mixed. The candidate or group of candidates in the position on an alphabetical list corresponding to the first number drawn shall be certified ahead of the other candidates listed on the alphabetical list. The candidate or group of candidates in the position on the alphabetical list corresponding to the second number drawn will be certified second and so forth until all numbers have been drawn. For example, where no group petitions were filed, if candidates Adams, Brown, Cook, Downs and Edwards filed simultaneously at 8:00 a.m. on the first day of filing, and the number three is the first drawn, then candidate Cook who is listed in the third position of the alphabetical list, shall be certified first on the ballot. If the number one is drawn second, then candidate Adams, who is listed in the first position on the alphabetical list, shall be certified second on the ballot . . . and so on. For offices where group petitions were filed, using the example set forth above where candidates Cook and Adams file a group petition for the same office, and Cook's name appears first on the petition, and number three is drawn first, then candidate Downs would be listed first. If the number two is drawn second, then candidates Cook and Adams would be certified second and third, respectively. If the number four is drawn third, then candidate Edwards would be certified fourth . . . and so on. In districts with fewer names on the alphabetical list than are in the drawing, then all numbers in excess of the number of candidates or group of candidates that appear on the particular alphabetical list shall be disregarded. Thus, if five numbers are placed in the container, and only four candidates or groups of candidates are on a particular list, then the number five shall be disregarded. In districts with fewer than four names, the numbers four and five shall be

disregarded. In districts with fewer than three names, the numbers three, four and five shall be disregarded. For example, if candidates Adams and Cook filing separate petitions, are the only candidates listed on the alphabetical list and five numbers are chosen in the following order, 3, 5, 4, 2 and 1, then candidate Cook's name will appear in the certification prior to the name of candidate Adams.

4. All candidates shall be certified in the order in which petitions have been filed with the State Board of Elections. In cases where candidates have filed simultaneously, they shall be certified (in the order determined by the lottery procedure outlined above) prior to candidates who filed for the same office who filed their petitions at a later time, except in those situations where the law requires rotation on a district-by-district basis.

Adopted by the Board November 21, 1975.

No. 75-1146

Supreme Court, U. S.
FILED
APR 12 1976
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1975

PAUL BRADLEY, WILLIAM COUSINS, PATRICK J. HUGHES, RONALD C. SMITH, CHARLOTTE ADELMAN, SHELVIN SINGER,

Plaintiffs-Appellants,

vs.

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Intervening Defendants-Appellees.

Appeal from the Supreme Court of Illinois

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS AND AFFIRM (WITH ADDITIONAL APPENDIX)

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In the
Supreme Court of the United States

OCTOBER TERM, 1975

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APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS AND AFFIRM

May it please the Court:

At the time of the filing of the jurisdictional statement, the Illinois Supreme Court had not rendered its opinion.[1] That opinion was not delivered until March 18, 1976, and was mailed to counsel shortly thereafter. It is accordingly appended here. (Appellants' Appendix I, Add'l App. 1)

In the light of that opinion, the ultimate question in the case becomes the constitutionality *vel non,* against equal protection and due process challenge, of a state judicial election procedure which encourages the use of the ballot to advertise a candidate's endorsement by the dominant political organization, but which precludes any showing of endorsement or qualification on the part of other candidates not so favored.

In the view of the Illinois Supreme Court, the grouping of organization candidates in sequence on the ballot is desirable because it furthers "the interest of the voter in being able to identify readily and accurately, inside the voting booth, those candidates for whom he wishes to vote". That, in the view of the Illinois court, was the legislative purpose of the procedure. (Add'l App. 7)

It must, however, be noted that Illinois' solicitude for the voters' problem[2] extends only to enabling him to

[1] The Motion to Dismiss states that "the opinion of the Supreme Court of Illinois is appended to the jurisdictional statement" (Motion, p. 2). The document thus referred to by defendants is merely the minute order of the Illinois Supreme Court, which was the only pronouncement of that court which existed at the time the Jurisdictional Statement was filed (App. 19-21, Jurisdictional Statement).

[2] The Chicago Democratic judicial ballot involved in this case listed forty-nine relatively unknown candidates for one group of fifteen vacancies; sixteen similar candidates for ten other vacancies; another thirty-two such candidates for an aggregate of twenty-five special vacancies; ten candidates for seven appellate court vacancies; and four candidates for two Supreme Court vacancies. Thus, the voter was entitled to cast sixty-four votes among 111 candidates, the vast bulk of them completely unknown to the public at large.

identify those candidates endorsed by the party leaders. That voter is coldly rebuffed, who seeks to identify those candidates found qualified by the Bar Associations and other civic groups, or those who are already sitting judges, or those with special attainments in any other area than politics. Section 16-3 of the Illinois Election Code (S.H.A. Chapter 46 §16-3) provides that a candidate may be listed only by his name: "No other designation such as title or degree or similar information may be used in connection with the candidate's surname except that the title 'Mrs.' may be used in the case of a married woman." Thus, "the interest of the voter in being able to identify readily and accurately, inside the voting booth, those candidates for whom he wishes to vote" is accommodated only if he wishes to vote for the candidates sponsored by the local party officials.

That same proprietary view of the primary election ballot is reflected in the appellee Board's motion to dismiss. The Board's presentation to your Honors delineates the issue in terms of "the right to associate with the political party of one's choice" (Motion, p. 5), thereby confusing the political party with its internal leadership.

The Board's position is based on *Cousins* v. *Wigoda* (1975) 419 U.S. 477, which held that a national political convention is free to seat whom it chooses, regardless of the outcome of the state delegate election. But a primary election to determine who will be the party's nominees, is exclusively the province of the voters, and not that of the party leaders. For this purpose, there simply is no analogy between a national nominating convention and a primary election. State action is all too clearly involved in a primary election, to suffer the granting of proprietary

interest in the ballot to any contending group. The appellants, no less than the intervenors,[3] have "the right to associate" with their political party in the sense of offering their primary candidacies to the electorate.

The Illinois Supreme Court's opinion also establishes the personal right of candidates favored by the party power structure "to retain their group identity upon the ballot" (Add'l App. 6). That holding lends retroactive relevance to the Appellees' argument, which centered upon protection of candidates' rights "to affiliate together" (Motion, p. 4); "to associate" (Motion, p. 5); and to enjoy "free political association" (Motion, p. 6). Those rights are indeed obvious; but they do not implicate a derivative right to favored candidates in a party primary to enjoy special designation on the ballot, just as their constitutional right to campaign for office does not permit them to use the ballot and polling place for that purpose.

The Illinois Supreme Court suggests that purposeful discrimination is not involved because the regulation was drafted in advance of the filing of petitions (Add'l App. 6). However, it would be erroneous to conclude that the regulation was routinely enacted or uniformly applied. Although a similar regulation was enacted in 1974 (Add'l App. 2-3) the regulation here challenged was specially adopted on November 21, 1975; kept secret for two weeks; and then filed as an "emergency" matter on December 3, 1975 (App. 4, Jurisdictional Statement). (The affected petitions were due on December 8, 1975 with a weekend intervening.) Thus, the Board of Elections remains free to adopt or disavow that regulation for each election, and only the insiders can predict its action. However, it required no power of prediction to know that the regular organization would nominate a candidate for each vacancy, just as it was clearly unlikely that unsponsored candidates would affiliate in such large groups. In any election with a substantial number of vacancies involved, the regulation must favor the party structure; and if the vacancy pattern for a given election neutralizes that advantage, the Board can simply refrain from adopting the regulation for that election. At any event, by not disclosing its decision until four days before the filing deadline, as in this case, the Board can substantially impede any judicial challenge.

[3] The Illinois Supreme Court opinion is in factual error in its statement that notice was not given to all candidates potentially affected (Add'l App. 4). As noted in our Jurisdictional Statement, the Illinois Supreme Court proceeded on only a partial trial court record. In fact, a complete notice of the pendency of the litigation was given to each individual candidate whose ballot position could arguably have been affected by the litigation. Several intervenors appeared in the trial court in response to that notice.

The opinion is also in error in stating that the trial court had found only the fourth ballot position to be prejudiced (Add'l App. 4). The trial court found, as the evidence proved (App. 7), that the regulation as applied denied appellants all chance for six of the top ten ballot positions (App. 10).

• • •

We suggest that the equal protection and due process implications are very serious, and pray that probable jurisdiction will be noted.

Respectfully submitted,

MELVIN B. LEWIS
Attorney for Appellants

ADDITIONAL APPENDIX "I"

(Opinion of The Supreme Court of Illinois, Filed March 18, 1976)

PAUL BRADLEY *et al.*, Appellees, v. FRANKLIN J. LUNDING, JR., *et al.*, Appellants.

MR. JUSTICE SCHAEFER delivered the opinion of the court:

The circuit court in Sangamon County held unconstitutional a regulation of the State Board of Elections dealing with the order in which the names of candidates are to be arranged upon the primary ballot, and directed that the ballot positions of the candidates be determined instead in a manner prescribed by the court. The appeal from this order was transferred to this court pursuant to Rule 302(b). An accelerated briefing schedule was fixed, and at the conclusion of oral argument the judgment of the circuit court was reversed. This opinion explains the reasons for that determination.

Sections 7-12 and 7-14 of the Election Code direct the Board to certify to the county clerks the list of candidates for nomination for elective offices by established political parties at primary elections. Certification consists of listing the candidates and the order in which the offices and the candidates for each office are to appear on the primary ballot. Section 7-12(6) provides:

> "• • • Petitions filed by mail and received after midnight and on hand upon the opening of the office involved, shall be deemed as filed as of 8:00 a.m. of that day or as of the normal opening hour of such day, as the case may be, and all petitions received thereafter shall be deemed as filed in the order of actual receipt. Where 2 or more petitions are received simultaneously, the State Board of Elections or the

various clerks with whom such petitions are filed shall break ties and determine the order of filing, and such determination shall be conclusive." Ill. Rev. Stat., ch. 46, par. 7-12.

Section 7-14 requires the Board to certify the candidates for each office in the order in which nominating petitions were filed. It provides:

"The State Board of Elections shall, in its certificate to the county clerk, certify the names of the offices, and the names of the candidates in the order in which the offices and names (except the names of candidates for State offices), shall appear upon the primary ballot; such names (except the names of candidates for State offices), to appear in the order in which petitions have been filed in the office of the State Board of Elections except as otherwise provided in this Article." Ill. Rev. Stat., ch. 46, par. 7-14.

The exceptions relate to the nomination of candidates whose ballot positions are rotated throughout the State by legislative districts.

The challenged regulation of the Board prescribes a lottery system to determine the order in which simultaneously filed petitions are deemed to have been filed. The circumstances that gave rise to this regulation are described in *Huff* v. *State Board of Elections* (1974), 57 Ill.2d 74. The regulation provides:

"The lottery system to be used to break ties resulting from the simultaneous filing with the State Board of Elections of petitions for the same office shall be as follows:

1. The names of all candidates who filed simultaneously for the same office shall be listed alphabetically and shall be numbered consecutively commencing with the number one which shall be assigned to the candidate whose name is listed first on the alphabetical list; provided, however, that candidates filing a group petition for the same office shall be treated as one in the alphabetical listing using the name of the first candidate for such office to appear on the petitions as the name to be included in the alphabetical list. • • •

• • •

4. All candidates shall be certified in the order in which petitions have been filed with the State Board of Elections. In cases where candidates have filed simultaneously, they shall be certified (in the order determined by the lottery procedure outlined above) prior to candidates who filed for the same office who filed their petitions at a later time, except in those situations where the law requires rotation on a district-by-district basis."

The complaint is in two counts. The plaintiffs in count I are seven candidates, each of whom, at 8 a.m. on the first day of filing, filed an individual nominating petition for the Democratic nomination for the office of judge of the circuit court, Cook County judicial circuit, to fill additional judgeships elected countywide. Fifteen candidates are to be nominated for this office, and the 15 who receive the highest number of votes will be nominated. Individual nominating petitions were also filed by ten other candidates at 8 a.m. Two "group petitions" were also filed at 8 a.m. One contained the names of two candidates, and the other contained the names of 15 candidates. Other candidates filed nominating petitions for this office after 8 a.m. on the first day of filing.

The plaintiffs in count II are two candidates, each of whom, at 8 a.m. on the first day of filing, filed an individual nominating petition for the Democratic nomination for the office of judge of the circuit court for the Cook County

judicial circuit to fill additional judgeships to be elected by voters inside the city of Chicago. Ten candidates are to be nominated for this office, and the ten who receive the highest number of votes will be nominated. Individual petitions were also filed by two other candidates at 8 a.m. A "group petition" which contained the names of ten candidates was also filed at 8 a.m. Other candidates filed nominating petitions after 8 a.m. on the first day of filing.

The defendants are the members of the State Board of Elections. The 15 group candidates in count I and the 10 group candidates in count II sought and were granted leave in the trial court to intervene as defendants. With the exception of the two candidates in count I who had filed a group petition, none of the other candidates involved in these contests was notified of the action or made a party to it. Petitions seeking leave to intervene were filed in this court, but because of the sharply curtailed schedule which was required in order to allow time to certify candidates and print ballots, no petition for leave to intervene in this court was allowed, although any who sought leave to intervene were permitted to file briefs as *amicus curiae.*

The trial court heard evidence and entered the following order:

> "1. That a lottery be conducted to break the tie for first place among those individuals filing simultaneously.
>
> 2. That those persons whose names appear on a group petition be permitted to remain together in a group on the ballot provided that their petition shall be deemed to have been filed after the individual petitioners and provided further that any person whose name appears on a group petition may withdraw his name from the petition and join in the lottery as an individual to be conducted for the purpose of determining the respective ballot positions, and provided further that in the race wherein two group petitions have been filed simultaneously, that a separate lottery be conducted for the purpose of determining which group petition shall appear before the other.
>
> The effect of this decision is limited to those persons who have joined in this law suit."

The order was stayed pending appeal.

Two of the *amicus* briefs related to candidates for judicial office in Cook County. It is not clear from one of them, filed in the form of suggestions in support of a petition for leave to intervene in this court, just what office or offices are involved. The suggestions express the view, however, that the order of the trial judge was correct insofar as it denied the right of candidates who had filed group petitions to participate in the lottery unless they abandoned their right to appear as a group on the ballot, but incorrect insofar as it permitted those candidates to appear as a group on the ballot if they forfeited their right to participate with other candidates in the lottery. This is the position asserted by the plaintiffs. The other *amicus* brief was filed on behalf of five candidates who had filed a group petition for the Republican nomination for the office of judge of the circuit court of Cook County to fill the five additional judgeships outside the city of Chicago. It supports the position of the defendants and the intervenors, who assert that the regulation is consistent with the statute, properly recognizes the right of association of group petitioners and does not arbitrarily discriminate against anyone.

Two competing considerations have been emphasized by the parties, and they are reflected in the trial court's order. One is the right of each candidate not to be discrimi-

nated against in the allotment of the ballot positions. This is the right that was involved in *Huff* v. *State Board of Elections* (1974), 57 Ill.2d 74, and the cases cited therein. The other is the right of candidates to join as a group in filing nominating petitions and to retain their group identity upon the ballot. Section 7-10 of the Election Code clearly contemplates the filing of nominating petitions which contain the names or more than one candidate when several vacancies exist in the same office, and section 7-14 requires that the names of candidates appear on the ballot in the order in which petitions were filed.

The trial court apparently felt that these two rights were incompatible. Concentrating upon count II, the trial judge found that a drawing conducted under the regulation would actually improve the chance of each of the individual plaintiffs involved in that count to obtain first, second, or third place on the ballot, but that upon the particular facts involved in that count, the chance of such a candidate to obtain fourth place was less than it would be if the group petition was disregarded. For that reason he ruled that the group petitioners forfeit their right to participate in the lottery unless they gave up their right to appear as a group on the ballot. It seems obvious, however, that the result of the application of the challenged regulation with respect to any particular office will always depend upon the number of vacancies to be filed, the number of candidates who file individual petitions and the number who join in group petitions. The regulation was necessarily drawn in advance of the filing of any petitions, and purposeful discrimination can not be charged. Its validity can not be made to depend upon the number of candidates and the way in which they file their nominating petitions for vacancies in a particular office. Moreover, as the trial judge pointed out, "there can be no convinc-

ing, scientific or empirical evidence of the effect of ballot placement on the vote a candidate receives," and "[t]he argument that first place is the only position of value may very well be true."

The real targets of the plaintiffs' attack are the statutory provisions that grant the right to file a group petition and provide that ballot positions shall be determined by the time of filing petitions. It is apparently the fear that group candidates may be recognized as such that prompted the filing of the complaint. In the trial court the plaintiffs argued that the regulation "reflects a policy of intentional and purposeful discrimination against the individuals because the group which was endorsed by the Democratic Central Committee is thereby identifiable on the ballot • • •." And it is apparently this reason that the plaintiffs argue in this court that the trial judge's order was erroneous insofar as it permitted the intervening defendants to remain upon the ballot as a group in any position.

There is present in this case a third consideration which seems to have been largely overlooked. That consideration is the interest of the voter is being able to identify readily and accurately, inside the voting booth, those candidates for whom he wishes to vote. The General Assembly apparently had this third consideration in mind in permitting the association of candidates upon group nominating petitions and in providing that ballot position be determined on the basis of nominating petitions rather than candidates.

For the reasons stated, we concluded that the plaintiffs had failed to establish that any constitutional or statutory right of theirs was invaded by the regulation of the State Board of Elections, and the judgment of the circuit court in Sangamon County was reversed.

Judgment reversed.